

Prerequisites for Immunity from Penalty - Wider Implications

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1. Provisions of section 270AA in brief

1.1. The Finance Act, 2016 introduced section 270AA of the Income-tax Act, 1961 ('the Act') to authorize the Assessing Officer to grant immunity to the taxpayers from imposition of penalty under section 270A of the Act and initiation of prosecution proceedings under section 276C and 276CC of the Act upon fulfilment of certain conditions as under:

- a. Tax and interest payable as per order of assessment or reassessment under section 143(3) or 147 of the Act, as the case may be, has been paid within the period specified in the notice of demand;
- b. Taxpayer has not filed appeal against the order of assessment or reassessment; and
- c. Penalty is initiated for under-reported income and not in relation to misreporting of income.

1.2. Taxpayer desirous of availing immunity under section 270AA of the Act is required to make an application in Form No. 68 to the Assessing Officer within 1 month from the end of the month in which the assessment / reassessment order passed by the Assessing Officer, is received by the taxpayer.

1.3. The Assessing Officer shall pass an order accepting or rejecting the application of the taxpayer within a period of 1 month from the end of the month in which the application was made by the taxpayer.

1.4. Where the Assessing Officer is to reject the application, an opportunity of being heard must be provided to the taxpayer.[\[1\]](#)

1.5. It is pertinent to note that the order passed by the Assessing Officer under section 270AA(4) of the Act is final and the taxpayer cannot appeal against the said order. Therefore, even if rejection order by the Assessing Officer is not acceptable to taxpayer, the taxpayer may not have recourse to approach appellate authorities. The only recourse to the taxpayer could be to explore remedy of filing writ before the High Court.[\[2\]](#)

2. Charge of under-reported income or misreporting of income

2.1. One of the important conditions to qualify for immunity under section 270AA of the Act is that the penalty should be initiated in relation to under-reported income and will not apply in case where the under-reported income qualifies as misreporting of income.

2.2. Sub-section (9) of Section 270A of the Act provides for following six cases where under-reporting of income would be held to be 'misreporting' of income to trigger of penalty at the higher rate of 200% of

the tax payable:

- a. Misrepresentation or suppression of facts;
- b. Failure to record the investments in the books of account;
- c. Claim of expenditure not substantiated by any evidence;
- d. Recording of any false entry in the books of account;
- e. Failure to record any receipt in the books of account having a bearing on the total income; and
- f. Failure to report any international transaction or deemed international transaction or specified domestic transaction.

2.3. Accordingly, if the assessment order clearly brings out that the additions in the order represent under-reported income, the taxpayer would be entitled to opt for immunity under section 270AA of the Act. Similarly, if it is clear from the assessment order that the under-reported income falls within any of the clauses of sub-section (9) of section 270A of the Act, thereby classifying the under-reported as misreporting of income, taxpayer would not be eligible for immunity under section 270AA of the Act.

2.4. However, in case of non-classification of addition between under-reported or misreporting of income in the assessment order or penalty notice for initiating penalty proceedings, ambiguities arise for the taxpayer to determine the eligibility to opt for immunity under section 270AA of the Act upfront. The issue culminates since the application for immunity under section 270A of the Act is to be made (i) in time bound manner upon receipt of assessment order; and (ii) after upfront payment of tax and interest specified in the demand notice. Therefore, it is always desirable that the Assessing Officer must indicate the ground / limb for initiation of penalty in the assessment order i.e., whether the penalty is initiated for under-reported or misreporting of income.

2.5. It is pertinent to note that the erstwhile provisions of section 271(1)(c) of the Act (applicable up to AY 2016-17) provided discretion to the tax authorities to levy penalty within the range of 100% - 300%. However, in the new penalty regime introduced under section 270A of the Act (applicable from AY 2017-18), the discretion with the tax authority as to the rate of levy of penalty is taken away. In fact, penalty at a higher rate of 200% of tax payable can be levied only when the case strictly falls within any of the clause (a) to (f) of sub-section (9) to section 270A, alleging misreporting of income.

2.6. When the statutory law itself provides for specific circumstances under which under-reported income could be treated as 'misreporting of income', coupled with fact that the charge of 'misreporting of income' to levy penalty results in double whammy to the taxpayers in terms of (i) higher rate of penalty of 200% of the tax payable; and (ii) depriving from opting for immunity under section 270AA of the Act, it become all the more onerous for the tax authorities to not only specify the charge or limb of levy of penalty i.e. under-reporting of income or misreporting of income, but also to specify the circumstances provided under clause (a) to (f) of section 270A(9) of the Act, where the charge for 'misreporting of income' is triggered.

3. Recent ruling by the Hon'ble Delhi High Court:

3.1. Recently, a similar case came up before the **Hon'ble Delhi High Court** in case of **Schneider Electric South East Asia (HQ) Pte Ltd. v. ACIT** [\[TS-226-HC-2022\(DEL\)\]](#) (hereinafter referred as 'Schneider Electric') wherein the order passed under section 270AA(4) of the Act, rejecting the taxpayer's application for immunity under section 270AA, was challenged before the Hon'ble High Court in a writ jurisdiction.

3.2. In the instant case, it is understood that the penalty notice issued the Assessing Officer did not specify the specify the limb or the charge under which the penalty proceedings had been initiated i.e., under-reporting of income' or 'misreporting of income'. Further, the assessment order did not specify the limb or the ingredient of section 270A(9) of the Act, which attracted the penalty for 'misreporting of income'.

3.3. The Hon'ble High Court observed that penalty initiated under section 270A of the Act for misreporting of income is erroneous and arbitrary as the penalty notice failed to specify the limb - 'underreporting' or 'misreporting' of income, under which the penalty proceedings had been initiated. It was further held that the mere reference to the word 'misreporting' in the assessment order without specifying how the ingredient of sub-section (9) of section 270A of the Act is satisfied, makes the assessment order arbitrary.

3.4. Highlighting the intent of section 270AA of the Act, the Hon'ble Court stated that the provisions of section 270AA of the Act aims to encourage and incentivize a taxpayer to (i) fast-track settlement of issue; (ii) recover tax demand; and (iii) reduce protracted litigation; and thereby directed to grant immunity under section 270AA of the Act to the Assessee.

4. Validity of penalty notice not specifying the charge of under-reported income or misreporting of income

4.1. In the aforesaid ruling of Hon'ble Delhi Court in case of Schneider Electric (supra), the validity of the order passed under section 270AA(4) of the Act rejecting the taxpayer's application seeking immunity was challenged and decided upon. Question therefore arises as to whether the penalty notice issued under section 270A of the Act without specifying the charge or limb (i.e., under-reported income or misreporting of income) could itself be valid in the eyes of law.

4.2. In this regard, inference may be drawn from the plethora of judicial precedents, albeit in context of provision of section 271(1)(c) of the Act, which has laid down the principles that the penalty notices not specifying the limb or charge under section 271(1)(c) of the Act i.e., whether penalty proceedings had been initiated (i) for concealment of particulars of income; or (ii) furnishing of inaccurate particulars of income, are invalid and bad in law.

- The **Hon'ble Karnataka High Court** in case of **CIT v. Manjunatha Cotton & Ginning Factory** [\[TS-936-HC-2012\(KAR\)-O\]](#) held that penalty notice issued under section 274 of the Act should specifically state the grounds mentioned in under section 271(1)(c) of the Act, i.e., whether it is for concealment of income or for furnishing of incorrect particulars of income. The assessee should know the grounds which he has to meet specifically. Otherwise, a principle of natural justice is offended. On the basis of such no penalty could be imposed to the assessee.

- In case of **CIT v. SSA's Emerald Meadows** [\[TS-5987-HC-2015\(KARNATAKA\)-O\]](#), the **Hon'ble Karnataka High Court** affirmed decision of the Tribunal, relying on decision of Manjunatha Cotton & Ginning Factory (supra), holding that notice issued by the assessing officer under section 274 read with section 271(1)(c) of the Act was bad in law, as it did not specify under which limb of section 271(1)(c) was the penalty proceedings initiated, i.e., whether for concealment of particulars of income or furnishing of inaccurate particulars of income.

The Special Leave Petition against the said order of High Court was dismissed by the **Hon'ble Supreme Court** in **CIT vs. SSA'S Emerald Meadows** [\[TS-5162-SC-2016-O\]](#).

- The **Hon'ble Supreme Court** in case of **Dilip N. Shroff** [\[TS-57-SC-2007-O\]](#), held:

*"83. It is of some significance that in the standard proforma used by the Assessing Officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done. **Thus, the Assessing Officer himself was not sure as to whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars.** Even before us, the learned Additional Solicitor General while placing the order of assessment laid emphasis that he had dealt with both the situations.*

84. The impugned order, therefore, suffers from non-application of mind. It was also bound to comply with the principles of natural justice."

[Emphasis Added]

- The **Hon'ble Bombay High Court** in case of **Mohd. Farhan A.**

Shaikh [\[TS-5569-HC-2021\(BOMBAY\)-O\]](#) held that where assessment order records satisfaction for imposing penalty on one or other, or both grounds mentioned in section 271(1)(c) of the Act, a mere defect in notice, not striking off irrelevant matter would vitiate penalty proceedings. The relevant extract of the decision is reproduced below:

“Question No. 1: If the assessment order clearly records satisfaction for imposing penalty on one or the other, or both grounds mentioned in Section 271(1)(c), does a mere defect in the notice—not striking off the irrelevant matter—vitate the penalty proceedings?”

181. It does. The primary burden lies on the Revenue. In the assessment proceedings, it forms an opinion, prima facie or otherwise, to launch penalty proceedings against the assessee. But that translates into action only through the statutory notice under section 271(1)(c), read with section 274 of IT Act. True, the assessment proceedings form the basis for the penalty proceedings, but they are not composite proceedings to draw strength from each other. Nor can each cure the other's defect. A penalty proceeding is a corollary; nevertheless, it must stand on its own. **These proceedings culminate under a different statutory scheme that remains distinct from the assessment proceedings. Therefore, the assessee must be informed of the grounds of the penalty proceedings only through statutory notice. An omnibus notice suffers from the vice of vagueness.**

182. More particularly, a penal provision, even with civil consequences, must be construed strictly. And ambiguity, if any, must be resolved in the affected assessee's favour.”

[Emphasis Added]

Also, referring to the decision of Hon'ble Supreme Court in case of Dilip N. Shroff (supra), the Hon'ble Bombay High Court further observed as under:

“Question No. 3: What is the effect of the Supreme Court's decision in Dilip N. Shroff Case (supra) on the issue of non-application of mind when the irrelevant portions of the printed notices are not struck off?”

187 In Dilip N. Shroff case (supra), for the Supreme Court, it is of "some significance that in the standard Pro-forma used by the assessing officer in issuing a notice despite the fact that the same postulates that inappropriate words and paragraphs were to be deleted, but the same had not been done". Then, Dilip N. Shroff case (supra), on facts, has felt that the assessing officer himself was not sure whether he had proceeded on the basis that the assessee had concealed his income or he had furnished inaccurate particulars.

188. We may, in this context, respectfully observe that a contravention of a mandatory condition or requirement for a communication to be valid communication is fatal, with no further proof. That said, even if the notice contains no caveat that the inapplicable portion be deleted, it is in the interest of fairness and justice that the notice must be precise. It should give no room for ambiguity. **Therefore, Dilip N. Shroff Case (supra) disapproves of the routine, ritualistic practice of issuing omnibus show-cause notices. That practice certainly betrays non- application of mind. And, therefore, the infraction of a mandatory procedure leading to penal consequences assumes or implies prejudice.**

...

191. As a result, we hold that Dilip N. Shroff Case (supra) treats omnibus show-cause notices as betraying non-application of mind and disapproves of the practice, to be particular, of issuing notices in printed form without deleting or striking off the inapplicable parts of that generic notice.”

[Emphasis Added]

5. Concluding remarks

The principles laid down by the decisions for specification of charge for initiating penalty proceedings,

though in the context of provisions of section 271(1)(c) of the Act, could be very well relevant for interpreting the provisions of new penalty regime of section 270A of the Act, more particularly when the charge of 'misreporting of income' under section 270A(9) of the Act have severe consequences in terms of higher rate of penalty and denial of immunity under section 270AA of the Act.

The decision of the Hon'ble Delhi High Court in case of **Schneider Electric** (supra) shall go a long way and provide a useful guidance to the tax authorities for initiate the penalty proceedings correctly and pass sustainable penalty orders.

[1] Refer proviso to section 270AA(4) of the Act and decision of the Hon'ble Calcutta High Court in case of Rajesh Dewan v. UOI [\[TS-6796-HC-2021\(CALCUTTA\)-O\]](#)

[2] However, the Hon'ble Bombay High Court in case of Haren Textiles (P.) Ltd. v. PCIT [\[TS-6710-HC-2021\(BOMBAY\)-O\]](#) allowed the application of the taxpayer under section 264 of the Act against the order passed under section 270AA(4) of the Act rejecting the application seeking immunity.